

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NEALE COLE)	
Claimant)	
VS.)	
)	Docket No. 1,024,223
GREAT PLAINS MANUFACTURING, INC.)	
Respondent)	
AND)	
)	
SENTRY INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appealed the April 16, 2009, Order entered by Administrative Law Judge Bruce E. Moore. The Workers Compensation Board heard oral argument on August 11, 2009.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for claimant. Brenden W. Webb of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board consists of the transcript of the April 16, 2009, motion hearing before Judge Moore; the unpublished Kansas Court of Appeals opinion filed in this claim on November 7, 2008; and the administrative file compiled by the Director of the Division of Workers Compensation. In addition, the record includes the transcript of the October 18, 2005, deposition of Neale Cole and the transcript of the May 2, 2006 preliminary hearing with attached exhibits.

ISSUES

This is a post-award proceeding in which claimant requests attorney fees for services rendered in attempting to obtain the payment of two outstanding medical bills. In the April 16, 2009, Order, Judge Moore awarded claimant post-award attorney fees in the sum of \$1,000 to be paid by respondent and its insurance carrier.

As of February 23, 2009, when claimant's attorney filed an affidavit setting forth the services rendered, the requested fees were in the amount of \$1,995.50. At the April 16, 2009, hearing before Judge Moore, claimant's attorney requested fees for an additional four hours for travel and preparing for that hearing. After expending additional time prosecuting this appeal, claimant's attorney increased his request for attorney fees to the sum of \$2,905.50 for the period of time through the filing of his brief to the Board.¹ Finally, at oral argument before the Board, claimant's attorney announced he had expended an additional 1.5 hours and, therefore, he was amending his request for attorney fees.

Claimant's attorney argues the \$1,000 awarded by Judge Moore is insufficient as he pursued the payment of claimant's outstanding medical bills from the administrative law judge level through an appeal taken by respondent to the Kansas Court of Appeals and, therefore, \$1,000 is not reasonable in light of the time expended and the work performed. Respondent, on the other hand, maintains the issue was overlitigated considering the relatively small amount involved and, therefore, no attorney fees should be awarded as the Court of Appeals ultimately ruled in its favor. In the alternative, respondent maintains the award of \$1,000 in attorney fees should stand as it is clear from the record that amount is fair and reasonable when considering all the circumstances.

The issues before the Board on this appeal are:

1. Is claimant's attorney entitled to receive any attorney fees from respondent for the services he rendered to claimant following the parties' October 31, 2006, Agreed Award in pursuit of penalties and payment of two outstanding medical bills?
2. If so, in what amount?

FINDINGS OF FACT

After reviewing the record, the Board finds as follows:

This request for attorney fees is ancillary to claimant's post-award pursuit of the payment of two outstanding emergency room bills. A brief summary of how the parties reached this juncture is appropriate.

The parties entered into an Agreed Award on October 31, 2006. The Agreed Award was drafted and submitted to Judge Moore for signature. Following the entry of the award, the question arose regarding the payment of two outstanding medical bills from visits to the

¹ Claimant filed his brief to the Board on June 11, 2009.

Russell Regional Hospital emergency room. When respondent declined to pay those bills, claimant initiated a proceeding for penalties and post-award attorney fees.

Judge Moore heard arguments in early June 2007 addressing claimant's request for penalties. On June 7, 2007, the Judge entered an order denying claimant's request. Claimant appealed the June 7, 2007, Order entered by Judge Moore to this Board. The Board specifically found that respondent was aware of the unpaid medical bills when the Agreed Award was entered and that under the terms of the Agreed Award the bills should be paid by respondent. Consequently, the Board assessed penalties against respondent and also remanded the claim to the Judge to determine an appropriate amount of attorney fees to be assessed against respondent. The Board entered that decision on August 30, 2007.

Respondent appealed the Board's August 30, 2007, Order to the Kansas Court of Appeals, which reversed the Board's decision. The Court of Appeals, in its decision filed November 7, 2008, reversed the Board for the stated reason the Board had failed to consider in harmony all three sentences in the Agreed Award dealing with the payment of medical expenses.

The litigation over the outstanding medical bills ended when the Court of Appeals' decision became final. Claimant's attorney set this matter for hearing to determine the request for attorney fees. The parties appeared before Judge Moore on April 16, 2009. Because the Judge questioned the legitimacy of claimant's request for the payment of the outstanding medical bills, the Judge determined claimant's attorney should not receive the amount of attorney fees he was requesting, which at that time encompassed 19.35 hours at \$130 per hour, or \$2,515.50. The Judge stated, in part:

I am going to allow an award of attorney's fees, I'm not going to grant the full amount requested by claimant, because I questioned at the time that I entered my original decision whether it was a legitimate claim for compensation under the circumstances.²

Because of the time expended following the April 16, 2009, hearing, claimant's attorney now requests fees representing 23.85³ hours at \$130 per hour,⁴ or a sum of

² M.H. Trans. at 7.

³ That number is derived by adding the 1.5 hours claimant's attorney added at oral argument before the Board to the 22.35 hours that had been previously expended as set forth in claimant's brief to the Board.

⁴ At oral argument before the Board claimant's attorney indicated his request for attorney fees was based upon \$135 per hour. But his affidavit setting forth the time expended and his brief to the Board indicate his fee request is based upon \$130 per hour.

\$3,100.50. Neither the time expended by claimant's attorney nor the hourly rate is challenged. The Board finds that the time expended by claimant's attorney is reasonable.

CONCLUSIONS OF LAW

The Workers Compensation Act provides that under some circumstances an injured worker's attorney may receive attorney fees for services rendered after an award is entered. The penalties statute, K.S.A. 44-512a, provides that a worker may seek civil penalties when any compensation, including medical compensation, is not paid although it has been awarded. And K.S.A. 44-536(g) provides that an attorney rendering services to a worker in an application for penalties may receive reasonable fees for rendering such services, and those fees are in addition to the fees the attorney is entitled to receive in connection with the original claim. K.S.A. 44-536(g) provides:

In the event any attorney renders services to an employee or the employee's dependents, **subsequent to the ultimate disposition of the initial and original claim**, and in connection with an application for review and modification, a hearing for additional medical benefits, **an application for penalties** or otherwise, **such attorney shall** be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and **such attorney fees shall be awarded** by the director **on the basis of the reasonable and customary charges** in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent. (Emphasis added.)

The Board finds claimant pursued penalties and payment of the outstanding medical bills in good faith and, therefore, claimant's attorney should receive reasonable attorney fees for the time and effort expended. Accordingly, the Board need not address whether attorney fees for the services rendered in an application for penalties are mandatory or only discretionary.

Upon finding that claimant's attorney is entitled to receive reasonable attorney fees, K.S.A. 44-536(g) provides that "such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services" As indicated above, the time expended by claimant's attorney in this matter, 23.85 hours, is

reasonable. In addition, the rate of \$130 per hour is reasonable for the services rendered. Indeed, in *Hernandez*⁵ the Kansas Court of Appeals indicated \$180 per hour was a reasonable hourly rate for the time expended in preparing and filing the appellate brief to the Court in that claim. Moreover, the Court of Appeals listed eight factors to consider in determining the reasonableness of attorney fees:

(1) time and labor required, novelty and difficulty of the questions involved, and the skill required to properly perform the legal service; (2) the likelihood that acceptance of particular employment precludes other employment by the attorney; (3) fees customarily charged in the locality for similar services; (4) the amount involved and the results obtained; (5) time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the attorney's experience, reputation, and ability; and (8) whether the fee is fixed or contingent. Kansas Rules of Professional Conduct, Rule 1.5(a) (2007 Kan. Ct. R. Annot. 428).

The Board finds the time and labor expended by claimant's attorney are reasonable in light of the issues involved. Moreover, the Board finds the rate charged by claimant's attorney is reasonable in light of the circumstances. Stating the obvious, time limitations were placed on counsel due to the appellate procedures involved. And finally, the relationship between counsel and claimant has existed for a number of years and claimant's counsel's reputation, experience, and ability in the field of workers compensation law is noteworthy.

The Board finds \$3,100.50 is a reasonable sum for attorney fees for the services claimant's attorney has rendered since the October 31, 2006, Agreed Award in pursuit of penalties and payment of two outstanding medical bills. Accordingly, the April 16, 2009, Order should be modified.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

WHEREFORE, the Board modifies the April 16, 2009, Order entered by Judge Moore and awards claimant's attorney \$3,100.50 in attorney fees to be paid by respondent and its insurance carrier.

⁵ *Hernandez v. Tyson Fresh Meats, Inc.*, No. 98,547, 2008 WL 2426347 (unpublished Kansas Court of Appeals opinion filed June 13, 2008).

⁶ K.S.A. 2008 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
 Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
 Bruce E. Moore, Administrative Law Judge